Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-5076

****

ERNEST FRANZILLE ARMSTRONG,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

****

ON WRIT OF CERTIORARI

TO THE

SUPREME COURT OF NORTH CAROLINA

RESPONSE OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

Citation to Opinion Below 1

Jurisdiction 1

Question Presented 2

Constitutional and Statutory Provisions Involved ... 2

Statement of Case 4

Statement of Facts 4

Argument 5

Conclusion 8

Appendix A: H.B. 953, Chap. 749, 1975 Session 1a

TABLE OF CASES

Fowler v. North Carolina, No. 73-7031
(Cert. granted October 29, 1974) 6,7

State v. Waddell, 282 N.C. 431, 194
S.E. 2d 19 (1973) 5

State v. Williams, 286 N.C. 422, 212
S.E. 2d 113 (1975) 5

Statutes:

28 USC §1257 (3) 1

N.C. Gen. Stat. § 14-21 (Repl. Vol. 1969) 5

§ 14-21 (1974 Supp.) 2,3,6

H.B. 953, Chap. 749, (1975 Sess.) 3,5

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CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 287 N.C. 60, 212 S.E. 2d 894 (1975), and is appended to Petitioner's Petition as Appendix A.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 USC §1257(3).

QUESTION PRESENTED

WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF RAPE UNDER THE LAW OF NORTH CAROLINA VIOLATE THE EIGHTH OR FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.
2. In addition to the statutes cited by defendant-petitioner in his Petition for Writ of Certiorari, the following provisions are applicable in this case:

A. N.C. Gen. Stat. Sec. 14-21 (1974 Supp.)

"§14-21. Rape; punishment in the first and second degree.--Every person who ravishes and carnally knows any female of the age of 12 years or more by force and against her will, or who unlawfully and carnally knows and abuses any female child under the age of 12 years, shall be guilty of rape, and upon conviction, shall be punished as follows:

(a) First-Degree Rape--

(1) If the person guilty of rape is more than 16 years of age, and the rape victim is a virtuous female child under the age of 12 years, the punishment shall be death; or

(2) If the person guilty of rape is more than 16 years of age, and the rape victim had her resistance overcome or her submission procured by the use of a deadly

weapon, or by infliction of serious bodily injury to her, the punishment shall be death.

(b) Second-Degree Rape--Any other offense of rape defined in this section shall be a lesser-included offense of rape in the first degree and shall be punished by imprisonment in the State's prison for life, or for a term of years in the discretion of the court.

B. The North Carolina General Assembly ratified H.B. 953, Chap. 749, 1975 Session, effective June 24, 1975 relating to punishment for rapes committed prior to the effective date of N.C. General Statute §14-21 (1974 Supp.). See Appendix A for authenticated copy of this legislation which has not yet been codified.

STATEMENT OF CASE

Petitioner, Ernest Franzille Armstrong, was tried and convicted of rape at the March 18, 1974, Criminal Session, Harnett County Superior Court, in Harnett County, North Carolina. Petitioner appealed his conviction to the North Carolina Supreme Court, which, in its Opinion filed 14 April 1975, affirmed petitioner's conviction and death sentence. Petitioner now seeks review in this Court upon Petition for Writ of Certiorari to review the judgment of the Supreme Court of North Carolina.

STATEMENT OF FACTS

The State-respondent adopts as its own as if fully set out herein the facts as stated by the North Carolina Supreme Court at pages 895-896 of its Opinion in State v. Armstrong, supra, a copy of which is appended to petitioner's petition as Appendix A.

ARGUMENT

THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF RAPE UNDER THE LAW OF NORTH CAROLINA VIOLATE THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

There is no valid reason now for the Court to grant Certiorari to pass upon this question. Petitioner's sentence of death was imposed under N.C. Gen. Stat. §14-21 as construed in State v. Waddell, 282 N.C. 431, 194 S.E. 2d 19 (1973). The North Carolina General Assembly subsequently ratified Chapter 1201, 1973 Session Laws (2nd Session, 1974), effective April 8, 1974; Chapter 1201 rewrote the prior existing General Statute 14-21 and has been codified by that same number. Under that Statute, "first degree" rapes are punishable by death, while "second degree" rapes are punishable by life imprisonment or for a term of years, in the discretion of the court. The North Carolina Supreme Court has held that the new N.C. Gen. Stat. 14-21 is not retroactive, hence not invalidating death sentences imposed for rape convictions under the Waddell holding. State v. Williams, 286 N.C. 422, 212 S.E. 2d 113 (1975).

However, on June 24, 1975, the North Carolina General Assembly ratified Chapter 749, 1975 Session Laws (House Bill 953), with such Chapter being effective immediately upon ratification.

This statute deals specifically with trials for rapes committed after January 18, 1973, and prior to April 8, 1974. Upon defendant's application, it requires review by the trial court of verdicts and sentences of death which are or have been sustained on appeal. The reviewing judge determines whether the evidence presented at the defendant's trial, plus additional evidence of the defendant's or the victim's age,

would have been sufficient to submit the defendant's case to a jury on the charge of first degree rape under G.S. 14-21(a) (1974 Supp.), had the rape occurred after April 8, 1974. If the question is answered in the negative, the judge shall forthwith schedule a hearing for the presentation of evidence relative to resentencing the defendant; after the hearing, the sentence of death for rape previously imposed shall be vacated, and the defendant shall be resentenced as if he had been convicted of second degree rape for a rape committed after April 8, 1974.

Based on the facts of the present case sub judice (involving a crime committed on November 11, 1973), it may very possibly fall within the provisions of Chapter 953 as hereinbefore cited. There was no finding that the petitioner possessed a deadly weapon, nor that the victim sustained serious bodily injury, nor was she under 12 years of age, at the time of the rape. Therefore, it would appear that the argument could be made to the Superior Court, that under N.C. Gen. Stat. 14-21 (1974 Supp.) petitioner's acts would constitute only second degree rape. Accordingly, the death sentence would necessarily be vacated and a new sentence entered pursuant to the provisions of the statute. In light of the foregoing discussion, it is clear that a further state court remedy is available to the petitioner respecting review of his death sentence for rape, which he has not exhausted. Hence the Court should deny this petition.

Moreover, should the Court determine that petitioner need not exhaust this remedy, there is nevertheless no valid reason for the Court to grant certiorari to presently hear this question. This Court in the case of Fowler v. North Carolina, No. 73-7031 (Oct. Term, 1974) granted certiorari to petitioner Jesse Thurman Fowler to hear this identical question. Extensive briefs were submitted in that case and oral arguments were made before this Court on April 21, 1975.

Re-argument has been scheduled for the October 1975 Term of this Court. This question therefore has been presented to the Court, has been accepted for hearing by the Court, oral arguments before this Court have already been made, and further arguments are to be made. Therefore, any decision in this case should be dependent upon the outcome of the Fowler case, and the petition to grant certiorari should be denied.

CONCLUSION

Based on the aforementioned reasons, the State-Respondent respectfully submits that certiorari be denied.

Respectfully submitted this the 6th day of August 1975.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing RESPONSE OF THE STATE OF NORTH CAROLINA TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA on petitioner by depositing the same in the United States Mail addressed to the following persons:

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This the 6th day of August, 1975.

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APPENDIX A

H.B. 953, Chap. 749, 1975 Session

STATE OF NORTH CAROLINA

Department of The Secretary of State

To all to whom these presents shall come, Greeting:

***I*, Thad Eure,** *Secretary of State of the State of North Carolina, do hereby certify the following and hereto attached (* 3 *sheets) to be a true copy of*

AN ACT RELATING TO PUNISHMENT FOR RAPES COMMITTED PRIOR TO THE EFFECTIVE DATE OF CHAPTER 1201, SESSION LAWS OF 1973.

the original of which is now on file and a matter of record in this office.

In Witness Whereof, *I have hereunto set my hand and affixed my official seal.*

Done in Office, *at Raleigh, this* 28th *day of* July *in the year of our Lord 19* 75

Secretary of State

CHAPTER 749

HOUSE BILL 953

AN ACT RELATING TO PUNISHMENT FOR RAPES COMMITTED PRIOR TO THE EFFECTIVE DATE OF CHAPTER 120, SESSION LAWS OF 1973.

The General Assembly of North Carolina enacts:

Section 1. The provisions of G.S. 14-21, as rewritten by Section 2 of Chapter 120 of the Session Laws of 1973, shall apply in all trials hereafter conducted for rapes committed after January 18, 1973, and prior to April 8, 1974, the effective date of Chapter 120, Session Laws of 1973.

Sec. 2. (a) In cases in which the defendant has been convicted of a rape committed after January 18, 1973, and prior to April 8, 1974, and the verdict and sentence of death are or have been sustained on appeal, the defendant may apply once to the judge presiding at the rape trial resulting in the sentence of death, or, if said judge is unavailable, to a resident superior court judge of the judicial district in which said rape trial was held, to determine whether the defendant could have been punished by death had the rape been committed by him after the ratification of Chapter 120, Session Laws of 1973.

(b) Said judge shall review a certified transcript of the evidence presented at trial (or if such transcript is not available, the record on appeal), make such independent investigation as he deems necessary to determine the age of the defendant or of the rape victim, and hear arguments or accept

briefs in behalf of the defendant and the State.

(c) Thereupon, the judge shall determine the following question:

Is the evidence presented at the defendant's trial, plus additional evidence of the age of the defendant or the age of the rape victim, sufficient to submit the defendant's case to a jury on the charge of first degree rape as defined by G.S. 14-21(a), had the date of the rape been after April 8, 1974?

(d) If the question is answered in the affirmative, the defendant shall remain subject to the sentence of death. If the question is answered in the negative, the judge shall forthwith schedule a hearing for the presentation of evidence relative to resentencing the defendant; after the hearing, the sentence of death for rape previously imposed shall be vacated, and the defendant shall be resentenced as if he had been convicted of second degree rape for a rape committed after April 8, 1974.

(e) There shall be no right of appeal from the determination of the judge, but the Supreme Court of North Carolina may, upon petition for certiorari, allow review of said determination.

(f) In cases of resentencing, the defendant shall be allowed credit for time spent in custody awaiting the execution of the sentence of death.

Sec. 3. An indigent person under sentence of death for a rape committed after January 18, 1973, and before April 8, 1974, shall be entitled to counsel in making one application under this act for each such sentence of death, if he is otherwise entitled under Article 36 of Chapter 7A of the General

Statutes of North Carolina.

Sec. 4. This act shall become effective upon ratification.

In the General Assembly read three times and ratified, this the 24th day of June, 1975.

James B. Hunt, Jr.
President of the Senate

James C. Green, Sr.
Speaker of the House of Representatives